

1                                   **DIVISION OF FACILITIES CONSTRUCTION**  
2                                   **AND MANAGEMENT BIDDING PROCESS**

3                                   1998 GENERAL SESSION

4                                   STATE OF UTAH

5                                   **Sponsor: Raymond W. Short**

6 AN ACT RELATING TO PUBLIC CONSTRUCTION CONTRACTS; MODIFYING  
7 SUBCONTRACTOR LIST REQUIREMENTS; CLARIFYING APPLICATION OF  
8 SUBCONTRACTOR REQUIREMENTS; AUTHORIZING THE DIRECTOR TO  
9 ESTABLISH A CONTRACTOR PERFORMANCE REVIEW COMMITTEE AND  
10 DEFINING ITS RESPONSIBILITIES AND DUTIES; CLARIFYING THE DIRECTOR'S  
11 POWER IN CERTAIN BIDDING SITUATIONS; AND IDENTIFYING PENALTIES.

12 This act affects sections of Utah Code Annotated 1953 as follows:

13 AMENDS:

14                   **63A-5-205**, as renumbered and amended by Chapter 212, Laws of Utah 1993

15                   **63A-5-208**, as renumbered and amended by Chapters 212 and 270, Laws of Utah 1993

16 *Be it enacted by the Legislature of the state of Utah:*

17                   Section 1. Section **63A-5-205** is amended to read:

18                   **63A-5-205. Contracting powers of director -- Retainage escrow.**

19                   (1) In accordance with Title 63, Chapter 56, Utah Procurement Code, the director may:

20                   (a) [~~may~~] enter into contracts for any work or professional services which the division or  
21 the State Building Board may do or have done; and

22                   (b) [~~may,~~] as a condition of any contract for architectural or engineering services, prohibit  
23 the architect or engineer from retaining a sales or agent engineer for the necessary design work[;].

24                   ~~[(c) shall let to the lowest responsible and qualified bidder any contract, except those for~~  
25 ~~professional services.]~~

26                   (2) The judgment of the director as to the responsibility and qualifications of a bidder is  
27 conclusive, except in case of fraud or bad faith.

1 (3) (a) If any payment on a contract with a private contractor to do work for the division  
2 or the State Building Board is retained or withheld, it shall be placed in an interest bearing account  
3 and the interest shall accrue for the benefit of the contractor and subcontractors to be paid after the  
4 project is completed and accepted by the director.

5 (b) The contractor shall ensure that any interest accrued on the retainage is distributed by  
6 the contractor to subcontractors on a pro rata basis.

7 Section 2. Section **63A-5-208** is amended to read:

8 **63A-5-208. Public construction bids to list subcontractors -- Changing**  
9 **subcontractors -- Bidders as subcontractors.**

10 (1) As used in this section:

11 (a) "First-tier subcontractor" means a subcontractor who contracts directly with the prime  
12 contractor.

13 (b) "Subcontractor" means any person or entity under contract with a contractor or another  
14 subcontractor to provide services or labor for the construction, installation, or repair of an  
15 improvement to real property.

16 (c) "Subcontractor" includes a trade contractor or specialty contractor.

17 (d) "Subcontractor" does not include suppliers who provide only materials, equipment, or  
18 supplies to a contractor or subcontractor.

19 (2) The director shall apply the provisions of this section to achieve fair and competitive  
20 bidding and to discourage bid-shopping by contractors.

21 ~~[(1)]~~ (3) (a) (i) (A) On each public construction project, the director shall require the  
22 apparent lowest three bidders to submit a list of their first-tier subcontractors indicating each  
23 subcontractor's name ~~[and]~~, bid amount, and other information required by rule.

24 (B) Other bidders who are not one of the apparent lowest three bidders may also submit  
25 a list of their first-tier subcontractors, containing the information required by this Subsection (3).

26 (C) The director may not consider any bid submitted by a bidder if the bidder fails to  
27 submit a subcontractor list meeting the requirements of this section.

28 (ii) On projects where the contractor's total bid is less than [~~\$250,000~~] \$500,000,  
29 subcontractors whose bid is less than [~~\$5,000~~] \$10,000 need not be listed.

30 (iii) On projects where the contractor's total bid is [~~\$250,000~~] \$500,000 or more,  
31 subcontractors whose bid is less than \$25,000 need not be listed.

1 (b) (i) The bidders shall submit this list within 24 hours after the bid opening time, not  
2 including Saturdays, Sundays, and state holidays.

3 (ii) This list does not limit the director's right to authorize a change in the listing of any  
4 subcontractor.

5 (c) ~~[(i)]~~ The ~~[apparent low contractors]~~ bidders shall verify that all subcontractors listed  
6 as part of their bids are licensed as required by state law.

7 ~~[(ii) If the director finds that any subcontractors are not licensed as required by state law,  
8 he may require the contractor to provide a substitute at no increased cost to the project.]~~

9 (d) ~~[24]~~ Twenty-four hours after the bid opening, the contractor may change his  
10 subcontractors only after:

11 (i) receiving permission from the director; and

12 (ii) establishing that:

13 (A) the change is in the best interest of the state; ~~[or]~~ and

14 ~~[(B) there is a sufficient reason for the change, including, error in bid figures, financial  
15 irresponsibility, inability of a subcontractor to perform, or other good reason.]~~

16 (B) the contractor establishes reasons for the change that meet the standards established  
17 by the State Building Board.

18 (e) If the director approves any changes in subcontractors that result in a net lower contract  
19 price for subcontracted work, the total of the prime contract may be reduced to reflect the changes.

20 ~~[(2) (a) A bidder may not list himself as a subcontractor unless the bidder:]~~

21 ~~[(i) intends to perform the work; and]~~

22 ~~[(ii) is currently licensed to perform the portion of the work for which the bidder listed  
23 himself as a subcontractor.]~~

24 ~~[(b) (i) The director may, by written request, require that a bidder who lists himself as a  
25 subcontractor provide the director with information indicating the bidder's:]~~

26 ~~[(A) previous experience in the type of work to be performed; and]~~

27 ~~[(B) qualifications for performing the work.]~~

28 ~~[(ii) The bidder must respond in writing within five business days of receiving the  
29 director's written request.]~~

30 ~~[(c) If the bidder's submitted information causes the director to reasonably believe that  
31 self-performance of the portion of the work by the bidder is likely to yield a substandard finished~~

1 product, the director shall:]

2 ~~[(i) require the bidder to use a subcontractor for the portion of the work in question; or]~~

3 ~~[(ii) reject the bidder's bid.]~~

4 (4) (a) A bidder may list himself as a subcontractor when the bidder is currently licensed  
5 to perform the portion of the work for which the bidder lists himself as a subcontractor and:

6 (i) the bidder intends to perform the work of a subcontractor himself; or

7 (ii) the bidder intends to obtain a subcontractor to perform the work at a later date because  
8 the bidder was unable to:

9 (A) obtain a bid from a qualified subcontractor; or

10 (B) obtain a bid from a qualified subcontractor at a cost that the bidder considers to be  
11 reasonable.

12 (b) (i) When the bidder intends to perform the work of a subcontractor himself, the director  
13 may, by written request, require that the bidder provide the director with information indicating  
14 the bidder's:

15 (A) previous experience in the type of work to be performed; and

16 (B) qualifications for performing the work.

17 (ii) The bidder must respond in writing within five business days of receiving the director's  
18 written request.

19 (iii) If the bidder's submitted information causes the director to reasonably believe that  
20 self-performance of the portion of the work by the bidder is likely to yield a substandard finished  
21 product, the director shall:

22 (A) require the bidder to use a subcontractor for the portion of the work in question and  
23 obtain the subcontractor bid under the supervision of the director; or

24 (B) reject the bidder's bid.

25 (c) (i) When the bidder intends to obtain a subcontractor to perform the work at a later  
26 date, the bidder shall provide documentation with the subcontractor list describing:

27 (A) the bidder's efforts to obtain a bid of a qualified subcontractor at a reasonable cost; and

28 (B) why the bidder was unable to obtain a qualified subcontractor bid.

29 (ii) If the bidder who intends to obtain a subcontractor to perform the work at a later date  
30 is awarded a contract, the director shall supervise the bidder's efforts to obtain a qualified  
31 subcontractor bid.

1           (iii) The director may not adjust the amount of the contract awarded in order to reflect the  
2 actual amount of the subcontractor's bid.

3           ~~[(3)]~~ (5) The division may not disclose any subcontractor ~~[bids]~~ bid amounts obtained  
4 under this section until the division has awarded the project to a contractor.

5           (6) (a) The director may establish a Contractor Performance Review Committee to:

6           (i) adjudicate complaints about contractor, subcontractor, and supplier performance by  
7 following the procedures and requirements of Section 63-56-48; and

8           (ii) when appropriate, impose suspensions or debarments from bidding on state building  
9 contracts on contractors, subcontractors, and suppliers for cause.

10           (b) In conducting hearings and making decisions under this Subsection (6), the Contractor  
11 Performance Review Committee is acting as the chief procurement officer or the head of  
12 purchasing agency for purposes of Section 63-56-48.

13           (7) In addition to all other reasons allowed by law or rule, the director may reject all bids  
14 if none of the bidders whose bid is within the budget of the project submit a subcontractor list that  
15 meets the requirements of this section.

16           (8) Any violation of this section, or any fraudulent misrepresentation by a contractor,  
17 subcontractor, or supplier, may be grounds for:

18           (a) the contractor, subcontractor, or supplier to be suspended or debarred by a Contractor  
19 Performance Review Committee; or

20           (b) the contractor or subcontractor to be disciplined by the Division of Professional and  
21 Occupational Licensing.

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**Legislative Review Note**  
**as of 1-23-98 11:54 AM**

A limited legal review of this bill raises no obvious constitutional or statutory concerns.

**Office of Legislative Research and General Counsel**